NO. 93-1456 and 93-1828

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

U.S. TERM LIMITS, INC.,
ARKANSANS FOR GOVERNMENTAL REFORM, INC.,
FRANK GILBERT, GREG RICE,
LON SCHULTZ, and SPENCER PLUMLEG,
Petitioners,

v.

RAY THORNTON, BLANCHE LAMBERT, DALE BUMPERS, DAVID PRYOR, *et al.*,
Respondents.

STATE OF ARKANSAS EX REL. WINSTON BRYANT,
Attorney General of the State of Arkansas,
Petitioners,

v.

BOBBIE E. HILL, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ARKANSAS

BRIEF OF STATE OF WASHINGTON AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Although the questions presented by the parties are somewhat broader, Amicus State of Washington devotes this brief to the following two questions:

1. Does a state law, which restricts ballot access by long term incumbents seeking re-election, impose a qualification for office within the meaning of Article I, Sections 2 and 3 of the Constitution?

2. Does the Elections Clause, Article I, Section 4, preserve state authority to comprehensively legislate regarding elections to the Senate and House of Representatives, in the absence of an affirmative Congressional override?

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INTERESTS OF AMICUS

The State of Washington participates in this case to protect the authority of the voters of the state to determine the course and scope of their own electoral process. This case

presents a fundamental question regarding the role of the states in our federal constitutional system. This Court will be asked to determine whether a state may regulate the manner in which its representatives in Congress are elected in the same ways it governs its own state electoral process.

In November, 1992, the voters of Washington approved Initiative 573, which is designed to encourage rotation in office for members of both Houses of Congress, as well as for various state offices. The initiative promotes rotation in office by denying certain incumbent officers the right to file declarations of candidacy and appear on the ballot for re-election to the same office. The Washington measure denies ballot access to any candidates for the U.S. House of Representatives who by the end of the then current term of office will have served as a Representative for six out of the previous twelve years, and candidates for the Senate who will have served for twelve of the previous eighteen years. Wash. Rev. Code §§ 29.68.015 and .016 (Supp. 1993).[1]

Although the Washington initiative denies ballot access to these categories of long-term incumbents, it specifically permits such candidates to run write-in campaigns. Wash. Rev. Code § 29.51.173. Washington, like Arkansas, imposes no barriers to holding office upon any successful candidate.

Washington's initiative was challenged within months of its enactment in the United States District Court for the Western District of Washington. On February 10, 1994, that Court issued an order on dispositive motions granting summary judgment in favor of the challengers, and holding Initiative 573

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[1] This limitation to a period of years differs from the approach taken by Arkansas that is at issue in this case. Arkansas places a permanent ban on ballot access for a particular office once a threshold tenure is reached in a particular office, while Washington allows access again after a period of time. *Compare* Ark. Const. amend. 73, § 3 *with* Wash. Rev. Code §§ 29.68.015 and .016.

unconstitutional. *Thorsted v. Gregoire*, 841 F. Supp. 1068 (W.D. Wash. 1994).[2]

Because of the similarity of issues between this case and *Thorsted*, Washington appears in this Court to defend the policy choice enacted by Washington voters in adding this limitation on ballot access. The United States Constitution, in Article I, Section 4, reserves to the states the function of conducting and regulating elections, including those of Senators and Representatives. This Court should reject this effort to judicially restrict the authority of the states to determine the rules by which their representatives in Congress will be selected.

STATEMENT OF THE CASE

The Elections Clause of the United States Constitution reserves to the states the function of determining the course and scope of the process of electing Representatives and Senators to the Congress. U.S. Const. art. I, § 4, cl. 1. By this action, respondents seek to deny both the states and the voters the ability to implement their preferences as to how their representatives in Congress will be chosen.

In November, 1992, the voters of Arkansas, by initiative, adopted Amendment 73 to their state constitution. That amendment promotes rotation in office among elected officials. As to members of the state's delegation to Congress, the amendment prohibits the placement on the ballot of the names of candidates who have served specified numbers of terms, for re-election to the same office. This limitation applies to those who have previously been elected to three or more terms

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[2] Appeals from that decision are currently pending before the United States Court of Appeals for the Ninth Circuit. *Thorsted v. Munro*, Nos. 94-35222, 94-35223, 94-35267, 94-35385, 94-35287, and 94-35289 (9th Cir. consolidated Apr. 4, 1994).

in the House of Representatives, or two or more terms in the Senate. Ark. Const. amend. 73, § 3.[3]

The Supreme Court of Arkansas held the application of Amendment 73 unconstitutional as to the Congressional delegation. The court regarded the limitation on ballot access as a "qualification" for office, although noting that such candidates could still seek re-election by write-in. *U.S. Term Limits, Inc. v. Hill*, 872 S.W.2d 349, 356-57 (Ark. 1994). The court upheld the amendment from a challenge based upon the First and Fourteenth Amendments, which would have applied to both state and federal offices. *Id.* at 360.

The decision of the Arkansas court raises fundamental questions regarding the role of the states within a federal system. Members of Congress are elected by state, rather than by districts distributed nationally. U.S. Const. art. I, § 2, cl. 3. The constitution reserves to the states the power to determine the manner of conducting such elections. U.S. Const. art. I, § 4, cl. 1. The reasoning of the lower court would replace the sovereignty of the states with a categorical imperative of uniformity unsupported by actual requirements of a federal system.

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[3] The amendment also limits the number of terms that may be served by state executive officers and legislators. The Arkansas Supreme Court upheld the constitutionality of the amendment as applied to those officers. *U.S. Term Limits, Inc. v. Hill*, 872 S.W.2d 349, 359-60 (Ark. 1994). Given the absence of a cross-petition from the decision of the court below, the application of Amendment 73 to those officers is not before this Court.

SUMMARY OF ARGUMENT

Amicus Washington devotes this brief to consideration of two fundamental concepts underlying this action. In view of the decision below that Amendment 73 violates the Qualifications Clauses found in Article I, Sections 2 and 3, it is necessary to determine what varieties of legal precepts will constitute "qualifications." The manner in which this Court defines that term will not only guide the decision that follows, but fundamentally affect future litigation regarding state regulation of elections, including potentially reopening litigation over issues previously regarded as settled.

This analysis reveals that a state law that does not prohibit the winner of an election from taking office does not constitute a qualification. Amendment 73 does not impose a qualification, because it does not wholly bar long-term incumbents from winning and taking office. Although the measure certainly makes victory more difficult for such candidates, their grievance in this regard must be reviewed under traditional First and Fourteenth Amendment ballot access principles. Courts applying such principles to similar measures (and to this measure in the lower court) virtually always uphold such provisions.

The second portion of this brief turns to consideration of the Elections Clause of Article I, Section 4. This clause preserves plenary state authority over the elections process, subject only to affirmative Congressional override. This provision makes clear that the states, as an integral aspect of their role in the federal system, retain their authority to legislate comprehensively regarding Congressional elections. Although the lower court assumed, without discussion, that a national rule of uniformity must characterize all federal elections, the Elections Clause preserves state discretion to adopt differing systems for determining their own Congressional representation. The states therefore retain authority to adopt their own provisions governing federal elections, so long as they do not violate other constitutional provisions.

Consideration of these points reveals that Amendment 73 does not impose a qualification for office, because it does not bar any candidates from office. Instead of raising issues under the Qualifications Clauses, Amendment 73 is an exercise of the states' authority to regulate elections under Article I, Section 4. The Constitution imposes no automatic rule of uniformity in such elections, but instead allows Congress the option of overriding state legislation where it affirmatively deems it appropriate to do so.

ARGUMENT

I. A STATE LAW THAT RESTRICTS BALLOT ACCESS OF LONG TERM INCUMBENTS, BUT WHICH DOES NOT PREVENT THE CANDIDATE RECEIVING THE MOST VOTES FROM TAKING OFFICE, DOES NOT ESTABLISH A QUALIFICATION FOR OFFICE.

A. The Qualifications Clause Does Not Provide a Basis for Broad Challenges to State Elections Laws

The Arkansas Court invalidated Amendment 73 as an asserted violation of the Qualifications Clauses, contained in Article I, Sections 2 and 3 of the United States Constitution. Those clauses prohibit service in either the House of Representatives or Senate unless an individual satisfies specified age, residence, and citizenship qualifications.

This issue presents a fundamental threshold question, the importance of which potentially extends to many future cases involving state election laws. Prior to determining how, or whether, the Qualifications Clauses apply to Amendment 73, this Court must determine what varieties of state elections laws constitute "qualifications," in light of the state function of conducting and regulating elections. U.S. Const. art. I, § 4, cl. 1.

This Court has not previously had the opportunity to review this question. Although cited by some as if it dictated the result of this case, the decision of this Court in *Powell v. McCormack*, 395 U.S. 486 (1969), determined only that a single house of Congress, acting alone and in a disciplinary capacity under Article I, Section 5, may not add qualifications to those already enumerated. Given this dearth of guidance from previous decisions of this Court, Amicus Washington derives its analysis largely from decisions of lower courts and underlying concepts. Although not binding upon this Court, such background can enlighten the intellectual basis upon which a thorough understanding of the issues can be based.

Neither the Arkansas Court in this case, nor the district court in the related Washington case, *Thorsted v. Gregoire*, 841 F. Supp. 1068, considered the concept of "qualifications" in a principled way. This Court has, however, resolved numerous challenges to state elections laws that are alleged to burden access to the ballot. *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986); *American Party of Texas v. White*, 415 U.S. 767 (1974). In doing so, this Court has, "recognized that, 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Anderson*, 460 U.S. at 788 (*quoting Storer v. Brown*, 415 U.S. 724, 730 (1974)). Although this Court has noted its concern that ballot access restrictions tend, "to limit the field of candidates from which voters might choose," *id.* at 786, it has held that, "[n]evertheless, the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Id.* at 788.

Those who would challenge ballot access measures designed to encourage rotation in office encounter a natural temptation to regard as a "qualification" any measure that might affect opportunities to serve in office. This temptation is understandable in light of the virtually universal holding that such restrictions (or even absolute term limits) satisfy the more

traditional First and Fourteenth Amendment analysis of state elections laws. *Miyazawa v. City of Cincinnati*, 825 F. Supp. 816 (S.D. Ohio 1993); *U.S. Term Limits*, 872 S.W.2d 349; *Legislature v. Eu*, 286 Cal. Rptr. 283, 816 P.2d 1309 (Cal. 1991), *cert. denied*, 112 S. Ct. 1292 (1992); *Maddox v. Fortson*, 172 S.E.2d 595 (Ga. 1970); *West Virginia ex rel. Maloney v. McCartney*, 223 S.E.2d 607 (W. Va.), *appeal dismissed sub. nom., Moore v. McCartney*, 425 U.S. 927 (1976). As the cited cases illustrate, many states have long pursued the policy of limiting the terms of certain state officers, particularly their governors. Since there is no principled reason to distinguish federal from state officers under the First and Fourteenth Amendments, those who would challenge reform measures such as Amendment 73 are forced to rely primarily upon the Qualifications Clauses, in the hope that the latter clauses might support a different result. If they are to succeed, they must either develop a theory rooted in the distinct nature of federal office, or argue that all previous courts to review state officer term limits have incorrectly ruled.[4]

This temptation to mix legal concepts raises the specter of unleashing a new set of challenges to state elections laws, based upon the unexamined premise that restrictions on ballot access constitute "qualifications for office." The District Court decision in *Thorsted* illustrates this danger. In that case, after noting that the Qualifications Clauses raise a different standard than do the First and Fourteenth Amendments, the court relied virtually exclusively upon First and Fourteenth Amendment cases

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[4] Either proposition invites this Court to establish a rule that would seriously impinge on the states' ability to enact systemic incumbency reform. "The universal authority is that restriction upon the succession of incumbents serves a rational public policy and that, while restrictions may deny qualified men an opportunity to serve, as a general rule, the overall health of the body politic is enhanced by limitations on continuous tenure." *Miyazawa*, 825 F. Supp. at 822 (*quoting Maloney*, 223 S.E.2d at 611).

to support a conclusion that a ballot access restriction imposed a qualification. *Thorsted*, 841 F. Supp. at 1079-81.[5]

If, in this case, Amendment 73 is determined to impose a qualification, without a careful examination of what a qualification entails, the temptation to future litigation over settled issues will prove irresistible. This Court has developed a thorough and cogent framework for the constitutional scrutiny of ballot access cases. It should not now transform the previously dormant Qualifications Clauses into a skeleton key, with which to unlock all state ballot access legislation.

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[5] The curious feature of the *Thorsted* court's use of Fourteenth Amendment ballot access principles derived from the rule of *Anderson v. Celebrezze*, 460 U.S. 780, is that the district court concluded that these principles, consistently applied by both state and federal courts to uphold even out-and-out term limits as to state offices, somehow chemically react with the Qualifications Clauses to produce the opposite result for federal offices. Two unrelated constitutional lines of analysis are combined to yield a result which would not follow from either line taken alone.

If a statute makes the candidate who receives the most votes the winner of the election, it does not establish a qualification. If the complaint, as here, is not that the winner isn't entitled to serve, but rather that the statute makes winning too difficult, then the question is not whether a qualification is established; rather, it is whether the statute violates the plaintiffs' rights under the First and Fourteenth Amendments, as defined by *Anderson* and its progeny. *Anderson*, 460 U.S. at 789. To the extent such issues may be raised in this action, Amicus Washington commends to the attention of this Court the cogent analysis of the Supreme Court of California. *Legislature v. Eu*, 816 P.2d 1309, 1322-29.

B. Amendment 73 Imposes No Qualifications For Office

The Arkansas Court invalidated Amendment 73 based upon the views that it imposed a qualification for office, and that states may not impose additional qualifications.[6] *U.S. Term Limits*, 872 S.W.2d at 356-57. The first portion of this inquiry requires a working definition of the term "qualification."

The Court of Appeals for the First Circuit has formulated a clear test for determining whether a state statute imposes a qualification. *Hopfmann v. Connolly*, 746 F.2d 97 (1st Cir. 1984), *vacated on other grounds*, 471 U.S. 459 (1985), *opinion on remand* 769 F.2d 24 (1st Cir. 1985), *cert. denied*

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[6] Other parties and amici will address the second part of this two-part inquiry, in which the court below concluded that states may not add qualifications to those stated in the Qualifications Clauses. It worth briefly noting, however, that this Court has recently clarified a key argument employed in *Powell* to support the conclusion that the enumerated qualifications are exclusive, in a manner that calls into question its application in *Powell*. The Qualifications Clauses are phrased negatively, in a manner suggestive of an intent merely to describe minimum qualifications rather than an exclusive list. This Court in *Powell* dismissed the significance of this phrasing, reasoning in part that the redrafting of the provisions in the Constitutional Convention's Committee on Style cannot be given substantive effect. *Powell*, 395 U.S. at 538-39. This Court more recently applied that argument to conclude that to dismiss the significance of the phrasing finally chosen for the Constitution, "would constrain us to say that the second to last draft would govern in every instance . . . ." *Nixon v. United States*, 506 U.S. ___, 113 S. Ct. 732, 737 (1993) (emphasis by the Court). The Court's reasoning in *Nixon* therefore invites a re-examination of the conclusion that negative phrasing of the Qualifications Clauses does not demonstrate an intent to list minimum requirements, instead of an exclusive list.

479 U.S. 1023 (1987). As the court there stated, "[T]he test to determine whether or not the 'restriction' amounts to a 'qualification' within the meaning of Article I, Section 3, is whether the candidate 'could be elected if his name were written in by a sufficient number of electors.'" *Id.*, 746 F.2d at 103 (*quoting State ex rel. Johnson v. Crane*, 197 P.2d 864, 871 (Wyo. 1948)). The court used this standard to uphold a Massachusetts statute restricting access to the primary election ballot to candidates attaining a certain percentage of the vote in a state party convention. *Id.* If the court's decision had been otherwise, the Qualifications Clause would have thereby been transformed into a universal solvent of state ballot access statutes, without regard to this Court's previous analysis under *Anderson* and its progeny.[7]

The Court of Appeals for the Eleventh Circuit has now adopted this definition of a "qualification" as well. *Public Citizen, Inc. v. Miller*, 992 F.2d 1548 (11th Cir. 1993), *aff'g* 813 F. Supp. 821 (N.D. Ga. 1993). The appellate court there adopted the opinion of the trial court. The district court held that Georgia's requirement of a run-off election if no candidate at the general election receives a majority is not a qualification for office, relying upon the *Hopfmann* test. *Public Citizen*, 813 F. Supp. at 832. A statute does not establish a qualification unless it "wholly disqualifies" a candidate who does not satisfy it. *Id.*

There is no such thing as a "partial qualification." Unlike the standard for First and Fourteenth Amendment review

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[7] Certainly there is a distinction between a complete bar to election and a mere "strong practical deterrent to election." *Stack v. Adams*, 315 F. Supp. 1295, 1298 (N.D. Fla. 1970). The voters of Washington may have perceived this distinction, when they adopted the measure at issue in *Thorsted* after rejecting, one year earlier, an initiative providing for absolute term limits.

under *Anderson*, the Qualifications Clauses do not trigger a balancing test. A statute either imposes a qualification or it does not. It therefore follows that a statute that allows a successful candidate to take office does not "wholly disqualify" that candidate, even if other issues under other constitutional provisions remain. *Public Citizen*, 813 F. Supp. at 832.

In *Joyner v. Mofford*, 706 F.2d 1523 (9th Cir.), *cert. denied*, 464 U.S. 1002 (1983), the Court of Appeals upheld an Arizona statute which required certain holders of Arizona state office to resign their state positions before running for certain other offices, including federal office. *Id.* at 1531. The court upheld the "resign-to-run" provision and distinguished it from a line of cases involving state statutes which actually barred certain candidates from seeking federal office. *Id.* at 1529. As the court noted, the Arizona statute "does not impose a fourth qualification on candidates for Congress because it does not prevent [any candidate] from running for federal office." *Id.* at 1531. Like the Arizona statute in *Joyner*, Amendment 73 regulates aspects of election to federal office, but does not bar service by any successful qualified candidate. Arizona merely sought to regulate the conduct of its own state officeholders by denying them a chance to seek federal office while simultaneously retaining their state office. *Id.*[8]

This view of the Qualifications Clauses is also consistent with the ordinary meaning of the word, "qualification." BLACK'S LAW DICTIONARY (6th ed. 1991) defines "qualification" as "[t]he possession by an individual of the qualities, properties, or circumstances, natural or adventitious, which are inherently or legally necessary to render him eligible to fill an office or to perform a public duty or function." The three constitutional qualifications for either House of the United States Congress meet this dictionary definition in that they state "qualities,

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[8] As a corollary, Amendment 73 imposes no qualifications for office because it does not render any long-term incumbent ineligible for appointment to fill a vacancy.

properties, or circumstances" -- age, residency, and citizenship -- which any person must possess in order to serve in Congress.

Amendment 73 adds no additional "qualities, properties, or circumstances" for federal office in addition to those contained in the United States Constitution. It does not purport to redefine as "unqualified for office" any category or subclass of person who meets the three constitutional qualifications. Although the amendment denies access to the printed ballot for certain long-term incumbents, even these incumbents, should they win the most votes through a write-in campaign, are fully eligible to serve in the office to which they have been elected. *U.S. Term Limits*, 872 S.W.2d at 357. The amendment does not purport to revoke the qualifications of any candidate for office; rather, it promotes rotation in office among those who meet the constitutional qualifications.

The Court of Appeals for the Tenth Circuit has held that, "there will be instances in which a candidate for elective office may constitutionally be limited to a write-in candidacy." *Skeen v. Hooper*, 631 F.2d 707, 711 (10th Cir. 1980). The court relied upon *Jenness v. Fortson*, 403 U.S. 431, 434 (1971), in which this Court distinguished between statutes that bar a candidacy completely and those that allow write-in voting. In *Skeen*, an incumbent Member of Congress died shortly after winning the Democratic primary for an additional term. No Republican had filed for the office. *Id.* at 708. The court upheld a New Mexico law that allowed the Democrats, but not the Republicans, to select a new nominee through the state central committees. The court held that, under the circumstances, the opportunity to wage a write-in campaign afforded sufficient opportunity to the Republican candidate. *Id.* at 711-12.[9]

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[9] Significantly, the plaintiff in that case, Joe Skeen, won that election as a write-in candidate. M. Barone and G. Ujifusa, THE ALMANAC OF AMERICAN POLITICS 1994, 847. Representative Skeen is but one example of individuals who have successfully

Courts construing the Qualifications Clauses have applied this view of what constitutes a qualification. For example, the Maryland Court rejected the contention that requiring a candidate to designate a campaign treasurer constituted a qualification for office. *Secretary of State v. McGucken*, 222 A.2d 693 (Md. 1966). The court reasoned that since the requirement "has no bearing on the eligibility of a candidate for office," it cannot constitute a qualification within the meaning of Article I, Section 2. *Id.* at 697.

The Nebraska court held that a state law limiting ballot access, "in no manner seeks to add other qualifications." *State ex rel. O'Sullivan v. Swanson*, 257 N.W. 255, 256 (Neb. 1934). The Nebraska statute at issue denied an unsuccessful primary candidate for governor the ability to appear on the ballot in the general election as a candidate for U.S. Senate. The court held this statute not to impose a qualification because of the possibility of running as a write-in. *Id.* at 255-56.

Even cases finding fault with state election statutes based on the qualifications clause have done so only when the state statute expressly prohibited a candidate from taking office. *See, e.g., Lowe v. Fowler*, 240 S.E.2d 70 (Ga. 1977) (holding inapplicable to federal office a prohibition in the Atlanta City Charter against the president of the city council qualifying for other elective office); *Opinion of the Judges*, 116 N.W.2d 233 (S.D. 1962) (holding inapplicable to federal office the prohibition against the Governor or Lieutenant Governor of South Dakota

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sought office by write-in. *Id.* at 202-03, 1143 (reciting other examples of write-in success by current members of Congress). These successful candidates have in common a well-known record and high name recognition prior to running as a write-in. These are precisely the characteristics one might expect of a long term incumbent affected by Amendment 73. These advantages are set forth more fully in the Affidavit of former Congressman William Frenzel, filed in the related *Thorsted* case and appended to this brief for the Court's reference.

becoming eligible to any other office during the term for which elected); *State ex rel. Wettengel v. Zimmerman*, 24 N.W.2d 504 (Wis. 1946) (holding a state court judge--the Honorable Joseph R. McCarthy--eligible to seek election to the United States Senate); *State ex rel. Chandler v. Howell*, 175 P. 569 (Wash. 1918) (holding that the ineligibility of judges to other offices, as specified in Article IV, Section 15 of the Washington Constitution, does not apply to federal office).

In all cases, courts have construed state statutes that allow the winner to serve in office not to constitute qualifications to office. The possibility of attaining re-election by write-in precludes a determination that Amendment 73 imposes a qualification.[10] Assertions that the state law places some candidates at a competitive disadvantage are properly analyzed under the First and Fourteenth Amendments instead. *See, e.g., Joyner*, 706 F.2d at 1531-33. Amendment 73 does not question the legal entitlement of a successful candidate to a Certificate of Election and to hold office. It therefore imposes no qualifications for office.

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[10] The district court in *Thorsted* equated write-in votes for established, well-known, and experienced long-term incumbents with the past experience of write-in votes cast for obscure or fringe candidates, and asserted: "Denial of ballot access ordinarily means unelectability." *Thorsted*, 841 F. Supp. at 1081 (emphasis added). The district court ignored the undeniably unordinary prospect of major candidates seeking write-in votes.

Although winning a campaign by write-in is more difficult than by having one's name on the ballot, candidates with high name recognition, of which long-time incumbents will almost always be examples, can mount successful write-in campaigns. In this regard, the Court should disregard statistics based primarily on write-in campaigns conducted by under-financed, last-minute fringe candidates, who historically account for the great majority of write-in campaign activity.

C. Rotation in Office Measures are Designed for Broad Effect on the Election System Over Time, and Do Not Change the Qualifications for Office.

To fully assess the intended and actual effects of laws such as Amendment 73, the Court must look beyond its effect on any single election. Those who would challenge the initiative under the Qualifications Clauses argue from a "snap-shot" of the effect of the law on a particular candidate in a particular election -- the long-term incumbent turned away by the elections official upon an attempt to file candidacy papers.

It is ironic to read Initiative 573 as rendering such a candidate "unqualified" for office. Indeed, such a candidate is obviously considered highly "qualified," because he or she has achieved election to the office not once, but several times. Contrasted with a single "snap-shot" of the candidate barred from the ballot at a point in time, a series of time-lapsed photographs of the candidate's political career, would reveal a candidate who in the past has been viewed as fully qualified, so much so that the voters have repeatedly elected the candidate to office. Even at present, the candidate may seek re-election by write-in, and serve additional terms if successful.[11]

This "time-lapse" approach shows that Amendment 73, and laws like it, are not intended to establish qualifications for the offices they affect. Their intent is not to close the office to people meeting the constitutional qualifications, but to open the office up to more of the people who meet those qualifications. To achieve that end, they encourage (but do not absolutely require) long-term officeholders to yield their positions to other qualified candidates from time to time, thus opening up the

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[11] Additionally, in many states, including Washington, the candidate may again be placed on the ballot after a specified number of years have lapsed since last holding the office. Wash. Rev. Code §§ 29.68.015 and .016.

position to a greater number of people and mitigating the perceived evils of long-term incumbency.

This Court took the longer "time-lapse" view in *Storer v. Brown*, 415 U.S. 724 (1974). That case involved a challenge to a California statute denying ballot access to those seeking election to office less than one year after changing their party affiliation. The statute in question applied to federal as well as to state offices. A "snap-shot" taken at filing time might have revealed a candidate who, while meeting all three constitutional qualifications for federal office, was not allowed to file. However, the Court specifically rejected a Qualifications Clause argument (terming it "wholly without merit"), *id.* at 746 n.16, analyzing the California statute instead (and upholding it) under the First and Fourteenth Amendment standards of equal protection, due process, and freedom of association.

II. THE CONSTITUTION RESERVES TO THE STATES PLENARY AUTHORITY (SUBJECT TO CONGRESSIONAL OVERRIDE) OVER THE CONDUCT OF ELECTIONS.

The Constitution reserves to the states broad authority to regulate the conduct of Congressional elections. U.S. Const. art. I, § 4. A challenge to state authority in this area therefore raises broader questions regarding the role of the states in a federal system. The analysis of state laws encouraging rotation in office must therefore take place within the larger context of reserved state authority to conduct elections.

The Elections Clause reserves plenary authority to the states over the conduct of elections, including federal elections, subject to possible Congressional override. The Constitution provides:

> The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by

Law make or alter such Regulations, except as to the Places of choosing Senators.

U.S. Const. art. I, § 4, cl. 1.

The Constitution therefore leaves to the states the design of elections systems, including those for Senators and Representatives. The states are free to vary from each other in their preferred methods, subject only to the possibility of Congressional override if the latter body affirmatively finds a need for greater uniformity. Absent such an active Congressional determination, the states retain plenary authority, subject only to the same general review under other constitutional provisions to which all state legislation is subject.

A. The Constitution Does Not Establish Uniform National Rules for Elections.

Lower court decisions invalidating rotation in office provisions have proceeded from the assumption that all fifty states must be uniform in their manner of representation in Congress. *U.S. Term Limits*, 872 S.W. 2d at 356. They have assumed that the selection process for all federal officers must be the same. *Thorsted*, 841 F. Supp. at 1082-83. Absent a Congressional determination to apply a contrary view in a particular context, an assumed mandate for uniformity directly contradicts the theoretical underpinnings of federalism and dual sovereignty. *See*, *Gregory v. Ashcroft*, 501 U.S. ___, 111 S. Ct. 2395, 2399-2403 (1991).

The Elections Clause states explicitly the concepts of federalism and dual sovereignty implicit in the Constitution as a whole. It first reserves broad authority to the states, and then provides for Congressional override as the exception (and not the general rule) when Congress finds a specific need. U.S. Const. art. I, § 4, cl. 1. Judicial imposition of mandatory uniformity, where Congress is silent, reverses these textual, constitutional priorities.

As a general rule, States are autonomous with regard to elections. *United States v. Classic*, 313 U.S. 299, 319 (1941). This state control is, "subject only to such minimum regulation as [Congress] should find necessary to insure the freedom and integrity of the choice." *Id.* at 319-20.

The relative roles of the states and Congress regarding elections are therefore precisely the opposite of their respective roles under the Commerce Clause. U.S. Const. art. I, § 8. In what has come to be called the "negative" or "dormant" Commerce Clause doctrine, this Court has explained that, "even without implementing legislation by Congress [the Commerce Clause] is a limitation upon the power of the States." *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328 (1977). The Commerce Clause is therefore viewed as affirmatively creating a national rule of uniformity, against economic protectionism by states. *Wyoming v. Oklahoma*, 502 U.S. ___, 112 S. Ct. 789, 800 (1992).

The Elections Clause textually establishes the opposite, however. While the Commerce Clause is viewed as promoting national uniformity, even when Congress is silent, the Elections Clause reserves authority to the states, unless Congress determines uniformity to be necessary. Except where Congress affirmatively opts for national uniformity, the Elections Clause allows the states to adopt their own systemic views of representation and the electoral process.

The framers therefore can not have regarded uniformity as the, "one watchword for representation of the various states in Congress," *U.S. Term Limits*, 872 S.W.2d at 356, because they did not draft an elections clause at all akin to the Commerce Clause. The framers would not have drafted an elections clause reserving primary authority to the states if they viewed Congressional elections as, in this Court's classic description of interstate commerce, "in their nature national, or admit[ting] only of one uniform system . . . ." *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319 (1852).

At the time of ratification, proponents of the Constitution explained the Elections Clause in precisely this way. At the Virginia ratifying convention, James Monroe inquired of James Madison why Congress was afforded a role in federal election regulation at all. Madison explained:

> It was found necessary to leave the regulation of these, in the first place, to the State Governments, as being the best acquainted with the situation of the people, subject to the control of the General Government, in order to enable it to produce uniformity, and prevent its own dissolution.

2 THE DEBATE ON THE CONSTITUTION 693-94 (Library of America, 1993). In Madison's view, therefore, uniformity is not an automatic rule, but an exception to the general rule of state discretion.

The debate at the North Carolina ratification convention also illustrates the framers' understanding that the Constitution would not mandate a uniform approach to federal elections. Responding to the objection that the Constitution would "take away that power of selections, which reason dictates [the states] ought to have among themselves," 2 *id.* at 854, James Iredell (later a Justice of this Court), concluded that Congress would declare uniform rules only as exceptions to a general rule of state control, where specific circumstances dictated. 2 *Id.* at 856-57.[12]

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[12] Several states included within their resolutions ratifying the constitution, the understanding that states would retain primary authority over elections, with federal uniformity but a rare necessity. 2 *Id.* at 548 (Massachusetts); 551 (New Hampshire); 554 (Maryland); 564 (Virginia); and 573 (North Carolina).

The Arkansas court therefore erred in viewing "uniformity" as a general governing principle of federal elections. The general rule is state autonomy, although Congress may determine that certain practices must be general where the national interest so requires. Madison explained, with particular regard to federal elections, "The State Governments may be regarded as constituent and essential parts of the federal Government." 2 *Id.* at 103 (Federalist 45). The authority reserved to them in the first instance by the Elections Clause merely reflects the nature of federalism.

The collective state practice over the past two hundred years has reflected this general rule of diversity. States have structured their electoral practices, including those related to federal office, in diverse ways. *See Libertarian Party of Washington v. Munro*, No. 92-36620, slip op. 7671, 7686 (9th Cir., July 14, 1994) (noting that states have adopted widely divergent systems for conducting elections and determining ballot access). Whether subtle or dramatic, the very concept of state regulation will affect ballot access differently in different states. Even so, this Court does not mandate a strict uniformity in the face of Congressional silence. *Compare Munro v. Socialist Workers Party*, 479 U.S. 189, 191-92 (1986) (describing Washington's practice of placing minor party candidates on the general election ballot only if they first secure a small number of petition signatures, and then garner 1 percent of the vote at the primary), with *Jenness v. Fortson*, 403 U.S. 431, 432 (1971) (describing Georgia's practice of requiring petition signatures amounting to five percent of the number of registered voters).

The broad authority retained by the states under the Elections Clauses encourages a healthy diversity of political structure and innovation. In the frequently recited metaphor of Justice Brandeis, the states may serve as laboratories for the nation. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). The concept of representation can be complex, and over time has been subject to differing views. Willi Paul Adams, THE FIRST AMERICAN CONSTITUTIONS 230-55 (1980) (reciting the various ways in

which the concept of democratic representation can be understood). The fact that these varying approaches might lead to different results in different states does not mean that they violate the constitutional scheme.

This Court applied this view in *Oregon v. Mitchell*, 400 U.S. 112 (1970). "In short, the Constitution allotted to the States the power to make laws regarding national elections, but provided that if Congress became dissatisfied with the state laws, Congress could alter them." *Id.* at 123 (opinion of Black, J.).[13] Justice Black wrote on behalf of a 5-4 majority that "the framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." *Id.* at 124-25 (footnote omitted). Therefore, except where Congress determines a uniform rule to be necessary, the states may establish their own comprehensive elections systems.

B. State Authority Over Elections Structures is Plenary.

The state authority preserved by the Elections Clause (subject to affirmative override) is plenary in nature. It extends not only to narrow procedural questions, but to all aspects of the elections process. Those who would oppose rotation in office measures such as Amendment 73, therefore, may not prevail by arguing that the states' authority under Article I, Section 4 is limited to such matters as the hours of polling place operation or the color of ballot envelopes. "Words , especially those of a constitution, are not to be read with such stultifying narrowness." *Classic*, 313 U.S. at 320.

The Elections Clause provides the states with broad authority to regulate all aspects of the election process, limited

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[13] In that case, differently-constituted majorities of this Court held that Congress could enact a uniform national voting age for federal elections, but could not do so for state elections. *Id.* at 117-18 (opinion of Black, J).

only by other express provisions of the Constitution or by pre-emptive federal legislation. "It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections . . . ." *Smiley v. Holm*, 285 U.S. 355, 366 (1931). The states possess the authority, "in short, to enact the numerous requirements as to procedures and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Id.*

This state authority will almost inevitably extend to the state's views of the systemic nature of representation. National concerns in this regard may be reflected in Congressional enactments under Section 4. Short of this, "Nothing in the original Constitution controlled the way the States might allocate their political power, except for the guarantee of a Republican Form of Government, which appears in Art. IV, § 4." *Oregon v. Mitchell*, 400 U.S. at 155-56 (opinion of Harlan, J.).

As this Court has previously noted, "the States have evolved comprehensive, and in many respects complex, elections codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualifications of candidates." *Storer*, 415 U.S. at 730.

Previous decisions have illustrated the comprehensive nature of state authority. This authority is not limited to a narrow construction of "time, place, and manner." *See, Anderson*, 460 U.S. at 788. The "manner" of elections extends broadly to the power to structure electoral systems comprehensively. *Classic*, 313 U.S. at 316, 320. This Court has also recognized the autonomy of the states over the very structure of the electoral system, including division of decisions

between primary and general elections. *Munro*, 479 U.S. at 196.[14]

The state of Arkansas exercised this plenary authority by enacting Amendment 73. Unless Congress affirmatively determines that state law provisions encouraging rotation in office must be subject to a uniform rule (whether by overriding such laws or by replacing them with a similar nationwide plan), Arkansas' action complies with the states' federal role in administering elections and charting its own policy regarding representation in Congress.

CONCLUSION

The role of the individual states as dual sovereigns within our federal system has been among the most frequent themes of constitutional jurisprudence. Article I of the Constitution reserves to the states the primary authority over the election of Senators and Representatives. States may exercise this authority by adopting measures designed to encourage rotation in office among members of the delegation to Congress from each state. The Constitution imposes no mandate of uniformity as to how each state, and its citizens, must view their representation in Congress. Absent an affirmative determination by Congress that a uniform federal rule is necessary, the states remain free to adopt their own unique systems for conducting elections and determining representation.

State laws affecting the likelihood of victory by some candidates do not thereby impose qualifications for office. Amendment 73 in no way prevents the candidate receiving the most votes from taking office. To regard a measure that may affect the probabilities as to the outcome of an election as a "qualification" is to contradict the normal understanding of the

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[14] The structure of an electoral process may affect the ultimate choice of the voters. *See*, James M. Buchanan and Gordon Tullock, THE CALCULUS OF CONSENT (1962).

term. To the extent the challengers to this measure seek to establish a constitutional impediment, they must look instead to this Court's established principles of ballot access. Courts applying such principles have generally upheld measures designed to encourage rotation in office.

For those reasons, this Court should reverse the judgment of the Supreme Court of Arkansas, and uphold the constitutionality of Amendment 73.

Respectfully submitted,

CHRISTINE O. GREGOIRE
Attorney General
JAMES K. PHARRIS
Sr. Assistant Attorney General
WILLIAM B. COLLINS
Sr. Assistant Attorney General
JEFFREY T. EVEN
Assistant Attorney General

Honorable William L. Dwyer

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SUSAN THORSTED, et al., Plaintiffs, v. CHRISTINE O. GREGOIRE, et al., Defendants, and SHERRY BOCKWINKEL, et al., Intervenor-Defendants.	No. C92-1763WD No. C93-770WD AFFIDAVIT OF WILLIAM E. FRENZEL IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF U.S. TERM LIMITS, INC., ET AL.
MARGARET COLONY, et al., Plaintiffs v. RALPH MUNRO, et al., Defendants, and SHERRY BOCKWINKEL, et al., Intervenor-Defendants.	

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DISTRICT OF COLUMBIA, ss.:

William E. Frenzel, being first duly sworn, deposes and says:

1. I am an adult citizen of the United States and a resident of Virginia. I make this affidavit based on my own knowledge and observation.

2. I am a Guest Scholar in the Brookings Governmental Studies program at the Brookings Institution in Washington, D.C., where I conduct research and lecture on public policy issues, including in particular the need for reform of Congress as an institution. I am also currently the Special Advisor to the President of the United States for the North American Free Trade Agreement.

3. From 1971 to 1991 I served ten consecutive terms as a member of the United States House of Representatives representing the Third District of Minnesota. I chose not to run for an eleventh term, and retired as a member of Congress on January 2, 1991.

4. Prior to my Congressional service, I had been a member of the Legislature of the State of Minnesota for eight years.

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5. During the time I was a member of the House of Representatives, I served as the Ranking Minority Member of the House Budget Committee. I also served on the Ways and Means Committee of the House of Representatives, and on its Subcommittee on Trade.

6. During the period 1971-1989 I also served on the House Administration Committee, of which I became the Ranking Minority Member. That committee has responsibility for election laws, and while serving on it I became very familiar with the provisions and effects of existing election laws, as well as the changes in election laws that occurred during that period.

7. In the course of my years on the House Administration Committee, and based upon my own research since that time, I have found no instance in history in which a legislative body or parliament changed election laws in such a way as to lessen the chances of re-election for incumbents, or to improve the election opportunities for challengers. The practice in such bodies, including the House of Representatives, is for incumbents to devise institutional structures and systems that favor incumbents.

8. In the course of my years on the House

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Administrative Committee, I participated in several enactments that changed the federal election laws. These included new disclosure requirements, new campaign financing restrictions, and creation of the Federal Election Commission. I observed that none of these changes lessened the great advantages of incumbents in the electoral process. In fact, some of the changes increased the power of incumbents -- such as, for example, campaign spending or contribution limitations that by setting equal dollar amounts can prevent challengers from spending more to become known to voters and to overcome their disadvantage in name recognition.

9. During my twenty years as a Member of the House of Representatives, I constantly observed the many advantages incumbents hold over all other candidates. These include fundraising, name recognition and many taxpayer-financed perquisites. I observed that incumbent Representatives are rarely defeated, and long-term incumbents almost never.

10. Congressional incumbents can exploit the perquisites of office to increase their visibility and favorable recognition in their home districts. Members of Congress receive taxpayer-financed salary, travel, office, staff, and

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communication allowances. Incumbents can prolong their incumbency through patronage, pork-barrel projects, name recognition and voter inertia.

11. Many advantages of incumbents are taxpayer-funded and legally sanctioned. One such advantage enjoyed and used by incumbents is the franking privilege, which allows them to blanket their districts with self-promoting mail at taxpayer expense. Not only does this allow incumbents to make mass mailings to every voter, at no expense to themselves. In addition, in recent years incumbents have also been able to use particularized mailing lists, generated at taxpayer expense, to send personalized first-class franked letters to voters with particular interests or backgrounds, even though those voters never communicated with them or sought such mailings.

12. Another enormously important taxpayer-financed advantage that has been used by incumbents more and more over the years is taxpayer-financed media facilities and distribution. These permit incumbents to receive free and frequent publicity on radio, television and cable broadcasts. The House of Representatives has a sophisticated recording studio, for use of members only, to prepare tapes of speeches and messages to

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voters. Taxpayers pay for the facilities, the personnel that run them, the production costs, and the costs of distributing, by mail or otherwise, the tapes that members supply (from their taxpayer-funded expense accounts). These messages are widely disseminated by broadcasters, who can use them to fill air time at no cost to themselves. Such messages have become particularly widespread on cable stations, which are an increasingly large share of the television market.

13. Members of the House are given large staffs, paid by the taxpayers. Generally the staff members come from a political background. The activities of these staff members in, for example, press contacts and constituent case work, serve to promote the re-election of the member. These staff personnel also participate in campaigns, with no effective check on how much of that activity occurs on government-paid time, and no clear line between legislative and political duties. Taxpayers also pay for staff travel, which often includes political aspects.

14. Besides taxpayer-paid offices in Washington, members may have offices in their districts. All the costs of those offices -- rental, furniture, fixtures, telephones, other communications equipment, and staffs -- are borne by the

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taxpayers. Members also receive an allowance for frequent government-paid travel to and from their districts.

15. Representatives and Senators have the ability to enhance their status with constituents by focusing on constituency service, or "casework," activities. With control over higher budgets and program authorizations, Representatives and Senators also possess the power to expedite and influence bureaucratic decisions, and take credit for them when they are favorable to constituents.

16. The institutional structure and political processes of Congress also provide significant benefits for incumbents, largely because of the Congress' seniority system. The longer a legislator stays in office, the more seniority he accumulates, and the more power he wields through the congressional caucus and on substantive committees. Under the seniority system, junior members who perform as the long-term incumbents desire can expect to be rewarded when they become long-term incumbents themselves. There is no practical way to escape the system when members stay in the House for literally decades. Also, in recent years the House has created so many subcommittee chairmanships that members soon reach modest

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positions of power or are on the verge of ascending, so that after a few years they have a vested interest in the seniority system. Legislative careerism has decimated congressional accountability to the people.

17. In addition to and related to the taxpayer-financed and institutional advantages of incumbents, Members of Congress also have a distinct advantage in elections simply because of their status as Members of Congress. For example, because they are Members of Congress, incumbents are often sought after by the media for interviews and television appearances. This enormous access to the media greatly influences their re-election success. They also have taxpayer-funded expense accounts, for frequent press releases and press conferences, and taxpayer-paid press secretaries and press aides to arrange such events. They are often invited to use public buildings both in Washington, D.C. and in their districts to hold such events. All this constant publicity costs the incumbent nothing.

18. The greater fundraising abilities of incumbents enable them vastly to outspend their challengers. This gap between incumbents and challengers has widened over time. In

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the 1974 campaign season, for example, the average House incumbent spent $56,539, roughly 41% more than the $40,015 spent by the average challenger. But in the 1988 campaign, House incumbents were able to raise campaign funds so disproportionately that they spent an average of $378,316, a 314% advantage over the average challenger. See Exhibit 1.

19. All of these advantages -- free mailings, free media access, the ability to perform constituent service and to bring favored projects to their constituents, and the ability to raise large amounts of money -- not only permit Members of Congress to present themselves in a favorable light, but also enhance their name recognition. Political consultants emphasize, and my own observation confirms, that unless there is some overriding issue in a particular year, many voters tend to vote for a name that is familiar to them.

20. These and other advantages of incumbency thus make it nearly impossible for a challenger to defeat a congressional incumbent. In the years preceding the enactment of Initiative Measure 573 in the State of Washington, 98.5% of incumbent House members seeking re-election were re-elected in 1986, 98.5% in 1988, and 96.3% in 1990. Similarly, in the

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United States Senate, 75% of incumbents seeking re-election were re-elected in 1986, 85.1% in 1988, and 96.9% in 1990. See Exhibit 2. The only drops in re-election rates, slight ones, tend to occur in the years following decennial redistricting, such as 1992. In such situations, new district lines may force one incumbent to run against another or place them in an unfamiliar constituency. Even so, the re-election rate remains extraordinarily high. In 1992, 86% of incumbent House members seeking re-election were re-elected, and 82% of Senate incumbents seeking re-election were re-elected. See Exhibit 3.

21. These results evidence and continue a pattern of electoral security for members of Congress. In the twenty-one elections from 1950 to 1990, the re-election rate for incumbents fell below 90% only in 1958, 1964, 1966, and 1974. See Exhibit 4. These re-election rates for incumbents are in marked contrast to those of the Nineteenth Century. Biennial turnover in the House of Representatives was greater than 40% for the most of the years preceding 1900. It has not approached that level since 1896, and was as low as 7.6% in 1988. See Exhibit 5.

22. Ease of re-election leads to prolonged

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incumbency. In Washington, Thomas Foley was elected to the 89th Congress on November 3, 1964, and has been re-elected to each succeeding Congress. Representative Jamie Whitten has been re-elected to the House for more than fifty years. Representative John Dingell has been re-elected to the House for thirty-eight years. Representative Dan Rostenkowski has been re-elected to the House for thirty-four years. Senator Bob Dole has been re-elected to the Senate for twenty-four years. Similarly, Senators Strom Thurmond and Robert L. Byrd have been re-elected to the Senate for thirty-eight and thirty-four years, respectively. Many similar examples could be given.

23. My observation and belief, based upon my many years of experience in and around the Congress of the United States, is that discouraging long legislative incumbency, by ballot-access restrictions and by term limits if necessary, is a reform essential to the assurance of a meaningfully representative government in the United States. The power of incumbency for elected officials, particularly those of the Congress of the United States, has become so great as to drown out alternative political voices and diminish responsiveness of those who are supposed to be the people's representatives to the people.

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24. Laws that simply restrict ballot access and allow a candidate's name to be written in would not automatically prevent re-election of incumbents. In modern times, representatives Thomas D. Alford of Arkansas, Joe Skeen of New Mexico, and Ron Packard of California all were elected to the House of Representatives by write-in votes. And the write-in election of Senator Strom Thurmond to the United States Senate confirms that ballot restrictions are not an absolute bar to election, particularly for politicians who have already achieved name recognition among the voters. See Exhibit 6.

25. Discouraging long congressional incumbency can be expected to result in more competitive elections, which will force elected representatives to be more responsive to the concerns of their constituents and increase congressional accountability. Legislation to discourage or prohibit long-term incumbency will induce Members of Congress to become less concerned with trying to build careers as professional legislators, and thus less susceptible to special- interest influence. Such laws may also minimize the influence of campaign money on incumbents. Special-interest groups' and lobbyists' influence may be expected to decrease accordingly.

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26. Assuring a circulation of membership through discouraging or restricting incumbency also will provide a regular infusion of new ideas and facilitate the breaking of legislative paralysis. It will allow more citizens to serve in Congress and reduce some of the advantages of incumbency. It will also eliminate the pervasive and undemocratic rule of seniority, whereby the House Speaker and chairmen of important committees have been elevated. Frequent turnover would leave Congress little choice but to elect its leaders democratically, on the basis of the policies and leadership qualities of the candidates. Based on my observation, both in the Minnesota legislature and the House of Representatives, it is not essential for a representative to have a long service in order to do an effective job of representing constituents. The principal obstacle to new members is the seniority system, which itself depends on long incumbency and would collapse without it. More importantly, Members of Congress who spend year after year in the federal capital are likely less and less to reflect the thinking and consensus of the people whom they are supposed to represent.

27. In 1971 I introduced a bill for a federal law that

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would limit congressional incumbency. I introduced similar bills in successive Congresses. None received significant support from the Members of the House. During my years of Congressional service, I observed that many such bills were introduced, but died quickly without debate. In fact, to my knowledge, only one such bill has been allowed to reach the floor of the House and to be voted upon. That occurred in 1947. The bill received only one vote, that of its sponsor.

28. Yet the polls, and the initiatives usually passed wherever the people have been allowed to vote on the question, all show overwhelming support for term limit laws of various kinds. Nevertheless, Congressional incumbents on issues like this ignore the clear wishes of the people, and vote their own self-interest. In my judgment and observation, they will always do so. Congress can never be expected to take the necessary steps to reform itself. Another example that confirms that self-interest will always override is the line-item veto, for which polls show overwhelming support, but which Congress will not enact because it would limit the institutional power of members.

29. The refusal of Representatives and Senators to support limits on incumbency confirms that the voters have no

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other recourse than to do so themselves by enacting restrictions that discourage or prohibit legislative incumbency. My personal belief, based upon my experience in Congress, is that limits on long-term incumbency, although such incumbency was never intended by the Framers of our government, must come from the voters, for it will not come from the Congress itself.

30. Attached as Exhibit 7 is an article dealing with these subjects which I published in The Brookings Review in 1992 before the people of Washington adopted Initiative Measure 573. I continue to vouch for the facts and believe in the opinions expressed therein.

/s/William E. Frenzel
WILLIAM E. FRENZEL

Subscribed and sworn to before
me this 11th day of November 1993:

/s/ Carol P. Halloch
NOTARY PUBLIC

My commission expires:
_____ 1993

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